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No. 89-241

In The
Supreme Court of the United States
October Term, 1989

DANIEL P. HULSEY,

Petitioner,

v.

USAIR, INC.,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION

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September 7, 1989

10 p

LIST OF PARTIES AND OTHER INTERESTED PERSONS

Parties to the proceeding are as follows:

1. Daniel P. Hulsey.
2. USAir, Inc. and USAir Group.
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RESPONDENT'S BRIEF IN OPPOSITION

USAir, Inc., Respondent, submits this Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit filed by Petitioner, Daniel P. Hulsey. The Petition should be denied because no issues of significant public importance are raised by the Petition, the Petition urges issues that were not raised before the circuit court or district court, and because legal issues described in the Petition do not have any factual basis in this case. The opinion of the Fifth Circuit, attached as Appendix A to the Petition, correctly describes the extent of protection afforded to displaced airline industry employees under section 43(d)(1) of the Airline Deregulation Act of 1978, 49 U.S.C. § 1552(d)(1).

STATEMENT OF THE CASE

Respondent adopts the statement of facts and description of proceedings contained in the decision of the Fifth Circuit in this case. *See* Appendix A to the Petition, pp. 2a-4a.

REASONS FOR DENYING THE WRIT

I. The Petition Does Not Raise An Important Or Relevant Issue Concerning Application Of Rule 56 Of The Federal Rules Of Civil Procedure.

Points I and II in Petitioner's "Reasons For Granting the Writ" urge that the district court erred by awarding and sustaining summary judgment despite a stay of discovery. Plaintiff's arguments are not based on the facts of this proceeding. First, discovery was stayed by agreement of the parties — not over the opposition of Petitioner. This fact is confirmed by Appendix H to the Petition. Second, after the stay of proceedings was lifted, Petitioner did not request that his interrogatories be answered, he did not file a motion to compel, and he did not initiate any discovery. Third, in opposing Respondent's Motion for Summary Judgment, Petitioner did not urge that the stay of discovery rendered the Motion for Summary Judgment premature. Fourth, Plaintiff did not raise an issue concerning the procedural posture of Respondent's Motion for Summary Judgment in his appeal to the Fifth Circuit.[1] Finally, the interrogatories and requests for production served by Petitioner before the agreed stay of proceedings are not material to the specific, undisputed facts upon which summary judgment was granted.

II. No Issue Of Importance Concerning Burdens Of Proof Is Raised By The Petition.

In pages 10-13 of the Petition, Mr. Hulsey contends that certiorari should be granted to decide whether the *McDon-*

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[1] Failure to raise an issue before the district court or court of appeals weighs against granting a writ of certiorari. *See Oneida County, N.Y. v. Oneida Indian Nation*, 470 U.S. 226, 244-245 (1985), *reh. denied*, 471 U.S. 1062 (1985); *Hoover v. Ronwin*, 466 U.S. 558, 574, n. 5 (1984), *reh. denied*, 467 U.S. 1268 (1984).

nell-Douglas[2] order of proof in employment discrimination cases is applicable to discharge claims under section 43(d)(1) of the Airline Deregulation Act of 1978. That issue of law is not supported by the facts and circumstances of this case, however, and is not appropriate for consideration by the Court. The district court and the court of appeals held that section 43(d)(1) extends only a preference in hiring and not post-hire rights superior to other employees. *See* Appendix A, p. 5a and Appendix D, p. 19a. Whether or not a sham hiring designed solely to circumvent the preference under section 43(d)(1) is actionable was not decided by the Fifth Circuit and is not an issue raised below or by the facts of this case. Petitioner alleged in proceedings before the district court that he was wrongfully discharged, he did not allege that he was hired with the intent of terminating his employment just to get around section 43(d)(1). Thus, the Court need not decide the legal sufficiency or define the order of proof that would apply in a case where facts alleged state a sham hiring cause of action.

III. Petitioner's Argument That USAir, Inc.'s Right To Terminate His Employment Should Have Been Deferred To Arbitration is Without Merit.

Petitioner's contention that his termination should have been referred to a System Board of Adjustment is specious. Petitioner did not allege, argue, or offer evidence before the district court that he attempted to file a grievance over his discharge or made any effort to invoke a System Board. The decision to challenge his discharge in federal court was made by Mr. Hulsey, and the limitations period for an action to compel arbitration over his termination from employment expired long before summary judgment was awarded. Additionally, the collective bargaining agreement gives the em-

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[2] *McDonnell-Douglas Corporation v. Green*, 411 U.S. 792 (1973).

ployer the right to terminate pilots during their first year of employment at USAir without regard to just cause and the employer and union have agreed that grievances over such discharges will not be heard by a System Board. Petitioner may not be heard to complain that he should have been given an arbitration hearing.

Putting aside the procedural deficiencies of Petitioner's arbitration deferral argument, there is no plausible ground for the argument that the Airline Deregulation Act provides for resolution of first right of hire claims through a System Board of Adjustment. Disputes arising under a labor contract between a carrier and a labor organization must be decided by a System Board, but no such dispute is at issue here. Petitioner's cause of action involves interpretation and application of the Airline Deregulation Act of 1978 and there is no basis for suggesting that the statute must be interpreted in the first instance by an arbitrator. *See McKinney v. Missouri-Kansas-Texas Railroad Co.*, 357 U.S. 265 (1968) (System Board not preemptive of claim by employee to enforce rights under federal veterans' preference laws); *Manning v. American Airlines, Inc.*, 329 F.2d 32 (2d Cir.), *cert. denied*, 379 U.S. 817 (1984) (dispute over application of Railway Labor Act, as opposed to labor contract, not limited to System Board of Adjustment).

IV. No Issue Of Substantial Public Importance Is Raised By The Petition.

Only employees of a certificated air carrier furloughed or terminated before October 24, 1988, as a consequence of economic problems attributable to airline deregulation, were extended a hiring preference. Employees laid off or terminated in reductions-in-force after October 24, 1988 are not covered by section 43(d)(1), and the volume of reported case law under section 43(d)(1) during the decade following

deregulation is slight. Congress' purpose in enacting section 43(d)(1) is appropriate, but little gain can be had to the public at-large by interpreting the scope and application of section 43(d)(1) at this time. Accordingly, the Petition should be denied. *See Rice v. Sioux City Cemetary*, 349 U.S. 70, 79 (1959) (importance of an issue must be viewed from perspective of society at-large — not just the interests of the parties).

Conclusion

None of the reasons advanced by Petitioner justifies granting a writ of certiorari. The district court and Fifth Circuit correctly held that section 43(d)(1) does not extend post-hiring protection greater than the protection against termination shared by other newly hired employees of a carrier. Petitioner did not raise an issue concerning actionability of allegedly sham hirings below, and there is no legitimate controversy or legal issue of substantial importance about the lower courts' application of FRCP 56 or its failure to defer to a System Board of Adjustment.

The Petition for Writ of Certiorari should be dismissed.

Respectfully submitted,

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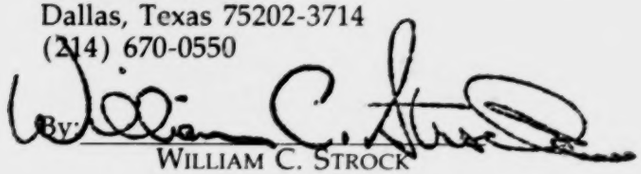

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